88-1072

No.

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF TENNESSEE, HAWKINS COUNTY, TENNESSEE, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES O. PHILLIPS III
Hawkins County Attorney
107 East Main St., Suite 205
Rogersville, Tennessee 37857-0289
(615) 272-7633

GEORGE JOHN KETO*
Alvord & Alvord
Suite 200
918 Sixteenth St., N.W.,
Washington, D.C. 20006-2973
(202) 393-2266
Counsel for
Petitioner, Hawkins
County, Tennessee, *et al.*

CHARLES W. BURSON
Attorney General and Reporter
State of Tennessee

CHARLES L. LEWIS*
Deputy Attorney General
WILLIAM E. YOUNG
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-1902
Counsel for Petitioner,
State of Tennessee

*Counsel of Record

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 200036 – 223-1220

QUESTION PRESENTED

Whether Tennessee may impose a tax on a private contractor's beneficial use of federal property and measure that tax by the value of the federal property, minus a deduction for any restricted use, in an effort to equalize taxation of federal contractors with that of owners and other users of property in the State, without violating the supremacy clause of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were (1) the State of Tennessee, (2) Hawkins County, Tennessee, (3) Dan Brooks, Hawkins County Executive, (4) Jerry Stewart, Hawkins County Trustee, (5) Grady Marshall, Hawkins County Property Assessor, (6) Donald Anderson, Carl K. Bailey, R. Wayne Crater, Hanes Cooper, Margaret Cooper, Virginia C. Dalton, Ina Danko, Frankie R. Davis, Wilburn K. Dean, Howard Elkins, Carl D. Frazier, Boyd Goodson, Albert B. Horn, D.L. Johnson, Kenneth H. Long, Claude K. Parrott, Jean J. Price, L.M. Sharp, R. Frank Testerman, Charles K. Thacker, Wayne Wagner, County Commissioners of Hawkins County and (7) the United States of America. All of these parties are petitioners to this Court, except for the United States which is the respondent.

TABLE OF CONTENTS

Page:

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT WHICH HAVE HELD THAT A TAX ON BENEFICIAL USE MAY BE MEASURED BY THE VALUE OF THE FEDERAL GOVERNMENT'S PROPERTY, SO LONG AS A MECHANISM EXISTS TO RESTRICT THE TAX TO THE ACTUAL USE OF THE PROPERTY 7

II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE SINCE IT SEVERELY CURTAILS STATES' ABILITY TO TAX PRIVATE CONTRACTOR'S BENEFICIAL USE OF FEDERAL PROPERTY, WHICH THIS COURT HAS RECOGNIZED AS A SEPARATE AND DISTINCT ACTIVITY SUBJECT TO STATE TAXATION, AND THEREBY RESTRICTS THE TAXING POWERS OF THE STATES UNDER THE SUPREMACY CLAUSE 12

CONCLUSION 14

APPENDIX:

I. Opinion and Judgment of Court of Appeals 1a

II. Memorandum Decision of District Court 7a

III. State Statutes Levying Tax Upon Use of Federal Property 16a

TABLE OF AUTHORITIES

Cases: Page

Alabama v. King & Boozer,
314 U.S. 1 (1941) 9

Curry v. United States,
314 U.S. 14 (1941) 9

Detroit v. Murray Corp.,
355 U.S. 489 (1958) 12

James v. Dravo Contracting Co.,
302 U.S. 134 (1937) 8

Lawrence v. State Tax Com.,
286 U.S. 276 (1932) 12

M'Culloch v. Maryland,
4 Wheat 316, 4 L.Ed. 579 (1819) 7

South Carolina v. Baker
108 S.Ct. 1355 (1988) 7

Sproul v. Gilbert,
359 P.2d 543 (Oregon 1961) 13

Thiokol Chemical Corp. v. Peterson,
393 P.2d 391 (Utah 1964) 13

Union Carbide Corporation v. Alexander,
679 S.W.2d 938 (Tenn. 1984) 5

United States v. Allegheny County,
322 U.S. 174 (1944) 10

United States v. Anderson County, Tennessee,
761 F.2d 1169 (6th Cir. 1985), *cert. denied*,
474 U.S. 919 (1985) 5

United States v. Boyd,
378 U.S. 39 (1964) 7, 8

Page

United States v. City of Detroit,
355 U.S. 466 (1958) 8, 9, 11, 13

United States v. County of Fresno,
429 U.S. 452 (1977) 7, 9, 10, 13

United States v. Hawkins County, Tenn.,
No. 85-5533 Slip. Op. (6th Cir., Jan. 8, 1987) 5

United States v. Hawkins County, Tenn. et al., and State of Tennessee,
661 F. Supp. 857 (E.D. Tenn. 1987), *Aff'd,*
859 F.2d 20 (6th Cir. 1988) 1

United States v. New Mexico,
455 U.S. 720 (1982) 7, 8, 9, 11

United States v. State Ex Rel. Beko,
493 P.2d 1321 (Nev. 1972) 13

United States v. State of Colorado,
460 F. Supp. 1184 (D.Colo. 1978), *aff'd* 627 F.2d 217
(10th Circuit, 1980), *summarily aff'd sub nom.*
Jefferson County v. United States, 450 U.S. 901 (1981) 11

United States v. Township of Muskegon,
355 U.S. 484 (1958) 7, 9, 11, 13

Washington v. United States,
460 U.S. 536 (1983) 8

Statutes:

Federal

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

28 U.S.C. § 1345 2

28 U.S.C. § 2201 2

Page

State

Tennessee Code Ann. § 67-5-203(a)(1) 2, 4, 10

Tenn. Code Ann. § 67-5-203(c) ... 2, 3, 5, 6, 7, 10, 11, 12, 13, 14

Tenn. Code Ann. § 67-5-212(a) 4

Tenn. Code Ann. § 67-5-601 3

Tenn. Code Ann. §§ 67-1501 — 67-5-1514 6

Tenn. Code Ann. § 67-6-209 3

Ariz. Rev. Stat. Ann. §§ 42-681-42-683 (1987 Supp.) 16a

Cal. [Rev. and Tax.] Code §§ 104-107 (West 1987) 17a

Title 18, Cal. Adm. Code ¶ 21(b) 17a

Colo. Rev. Stat. § 39-3-112 (West 1988 Supp.) 17a

Mich. Comp. Laws Ann. § 211.181 (1986) 17a

Minn. Stat. Ann. § 273.19 (West 1988 Supp.) 18a

Mont. Code Ann. § 15-24-1101 (1987) 18a

Nev. Rev. Stat. §§ 361.157 & 361.159 (1987 supp.) 19a

Or. Rev. Stat. § 307.060 (1986) 20a

Utah Code Ann. § 59-4-101 (1987 Repl.) 20a

Miscellaneous:

United States Constitution, Art. VI, cl.2 4

Tennessee Constitution, Art. 2, Sec. 28 4

Constitution of Alaska, Sec. 5 ..... 13, 16a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No.

STATE OF TENNESSEE AND HAWKINS COUNTY, TENNESSEE, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, including the State of Tennessee and Hawkins County, Tennessee, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on September 30, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 859 F.2d 20 (6th Cir. 1988), and is reprinted in the appendix hereto, p. 1a *infra*.

The memorandum decision of the United States District Court for the Eastern District of Tennessee (Hull, D.J.) is reported at 661 F. Supp. 857 (E.D. Tenn. 1987), and is reprinted in the appendix hereto, p. 7a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1345 and 28 U.S.C. § 2201, the respondent brought this suit in the Eastern District of Tennessee, Northeastern Division. On April 10, 1987, the Eastern District granted the repondent's motion for summary judgment. *See* p. 7a, *infra*.

On petitioners' appeal, the Sixth Circuit on September 30, 1988, entered a judgment and an opinion affirming on other grounds the Eastern District's judgment. *See* p. 1a, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Tenn. Code Ann. § 67-5-203. Government Property. (a)(1) All property of the United States, all property of the state of Tennessee, of any county, or of any incorporated town, city, or taxing district in the state that is used exclusively for public, county or municipal purposes shall be exempt from taxation; provided, however, that real property purchased for investment purposes by the Tennessee consolidated retirement system shall be subject to property taxation.

* * * * *

(c) All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 67-5-601, subject only to a deduction for any restricted use. This subsection (c) shall not affect sales and use taxes imposed on users of federal property by § 67-6-209. . . .

STATEMENT OF THE CASE

Hawkins County, Tennessee levied a tax on a cost-plus private contractor's beneficial use of a federally-owned industrial facility, the Holston Army Ammunition Plant ("Plant"), and federally-owned personal property pursuant to Tenn. Code Ann. § 67-5-203(c). This statute was enacted by the Tennessee legislature to tax such beneficial use so as to equalize the tax burdens of federal contractors with other users and owners of property in the State. The Sixth Circuit held that whatever the legislature intended, Tenn. Code Ann. § 67-5-203(c) "described" an ad valorem tax on an interest in real property and not a tax on the private contractor's beneficial use of the property, and therefore voided the tax.

The private contractor upon which this beneficial use tax was assessed, Holston Defense Corporation ("Holston"), contracts with the United States on a cost-plus basis to produce munitions. Holston, a wholly owned subsidiary of Eastman Kodak Company, is, under the current contract, an independent contractor and not an agent of the United States. Since 1949, Holston has been allowed under its contract to use the 500 or more buildings located on the 6,000-acre plant as well as federally-owned personal property in order to fulfill its contractual obligations. In addition, Holston is reimbursed all its costs incurred in the operation of the plant and receives a negotiated annual fee which on occasion has added incentives, such as for achieving lower costs than targeted. In 1985, cost reimbursements were almost $76,000,000, and the fee over $4,000,000. In the seven-year period ending in 1986, Holston's fees were almost $23,000,000. These profits were passed on by dividends to Holston's parent, Eastman Kodak.

In Tennesee, the principal source of revenues for counties is from general ad valorem property taxation. Although Holston enjoys the benefits of local government, neither Holston nor

Eastman Kodak has ever paid any taxes to Hawkins County. Nor has the United States, Holston or Eastman Kodak ever made any payment-in-lieu-of-taxes to the County.

Article 2, § 28 of the Constitution of the State of Tennessee makes *all* property in the state subject to taxation, but permits the legislature to exempt from taxation property of the state used exclusively for a public purpose and property of religious, educational, charitable and scientific institutions used exclusively for the purposes for which those entities were created. The legislature has granted such exemptions pursuant to Tenn. Code Ann. § 67-5-203(a)(1) and § 67-5-212(a)(1). Thus when property of the state, its political subdivisions and private exempt institutions is used for a purpose other than that for which those entitites were created, the exemption fails and the property is subject to a tax to the extent it is so used. But since under the Supremacy Clause of the United States Constitution (art. VI, cl.2) the property of the United States remains exempt from state taxation regardless of what use is made of it, the legislature could not tax federal property as it does state and other exempt property.

In 1982, Hawkins County sought to equalize the economic burdens of taxation by imposing its general ad valorem real property tax on Holston's use of the federal plant. The County took the position that by virtue of its contractual right to possess and use the government facility in its cost-plus operation, Holston had an interest in real property which was subject to taxation under the existing ad valorem real property tax statutes. The United States brought an action in the district court seeking a declaratory judgment that Holston had no such interest in the property that could be subject to a real property tax. A similar case had previously been filed against Anderson County, Tennessee, in response to its attempt to levy a real property tax against the possession and

use of Union Carbide Corporation, another cost-plus private contractor of the United States.

In each case, the district court rejected the imposition of the real property tax, holding that while Holston's and Union Carbide's possession and use were interests in real property, such interests were not taxable under the state's existing ad valorem real property tax statutes. Both decisions were affirmed by the Sixth Circuit in separate opinions, based upon a decision of the Tennessee Supreme Court in *Union Carbide Corporation v. Alexander*, 679 S.W.2d 938, 940-942 (Tenn. 1984), which held that while the interest of Union Carbide in the government-owned plant could be subject to a privilege or use tax, it was not a real property interest that could be taxed pursuant to the Tennessee ad valorem real property tax statute. The Tennessee Supreme Court specifically stated that "[a] tax burden such as that sought to be imposed on Union Carbide is a matter for the legislature and not this court." *Id.* at 942. *United States v. Anderson County, Tenn.*, 761 F.2d 1169, 1173-74 (6th Cir.), *cert. denied*, 474 U.S. 919 (1985); *United States v. Hawkins County, Tenn.*, No. 85-5533, slip op. (6th Cir. Jan. 8, 1987).

In response to this decision, Tennessee enacted Tenn. Code Ann. § 67-5-203(c) which authorizes counties to impose a tax on users of federal property, with the value of such use to be measured by the value of the federal property *minus a deduction for contractual restrictions on that property's use*, unless the property is used for an exclusively public purpose or the user is an agent or instrumentality of the United States. The property assessor for Hawkins County, Tennessee, a government subdivision of the State of Tennessee, assessed a tax against Holston Defense Corporation in accordance with the provisions of Tenn. Code Ann. § 67-5-203(c). The assessed values were determined by the Hawkins county property

assessor using accepted appraisal methods based on replacement costs provided to the assessor by the Army. Starting with these "replacement costs" the assessor subtracted depreciation to arrive at "current value" *and then reduced that value by an additional forty percent attributed to the contractual restrictions on Holston's use,* in order to arrive at the value of Holston's beneficial use of the federal property. Thus the Tennessee tax is imposed only on the contractor's interest in the property and not on the government's. The statutory rate of assessment for industrial and commercial real property was then applied to arrive at "assessed value." Holston appealed both the valuation and the validity of the assessment to the Tennessee Board of Equalization.[1]

The United States then filed its complaint in this case with the district court questioning the constitutionality of Tenn. Code Ann. § 67-5-203(c), and requesting an injunction against the imposition of the tax. The district court granted the United States' motion for summary judgment, holding that Holston was so closely interrelated with the United States that the purported tax was, in reality, a tax on the underlying government property itself. The Sixth Circuit affirmed this decision on other grounds. It determined that Holston did possess a beneficial use of the government-owned property. Nonetheless, the Sixth Circuit found that Tenn. Code Ann. § 67-5-203(c) "fairly cannot be said to impose a tax on Holston's beneficial use; instead, the statute describes an ad valorem tax on an interest in real property." p. 5a, *infra*. The court

[1]Holston's appeal lies before the State Board of Equalization pending the disposition of the federal suit. The County Assessor's valuation of Holston's beneficial use was the initial assessment in Tennessee pursuant to Tenn. Code Ann. § 67-5-203(c). Under Tennessee's system of taxation, the State Board is charged with the principal responsibility of interpreting the tax code for assessment purposes and of effecting the equalization of taxes throughout the state. Further, its decisions are subject to Judicial review. *See* Tenn. Code Ann. §§ 67-5-1501 - 67-5-1514.

concluded that "Tennessee's attempt to tax Holston resulted in what was, in reality, a tax upon the United States itself." p. 6a, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT WHICH HAVE HELD THAT A TAX ON BENEFICIAL USE MAY BE MEASURED BY THE VALUE OF THE FEDERAL GOVERNMENT'S PROPERTY, SO LONG AS A MECHANISM EXISTS TO RESTRICT THE TAX TO THE ACTUAL USE OF THE PROPERTY.

This Court has unequivocally stated that a private contractor's use of federal tax-exempt property in connection with its commercial activities carried on for a profit constitutes "a separate and distinct taxable activity," and that such a tax may be measured by the value of the federal property used. *United States v. New Mexico*, 455 U.S. 720, 733-735 (1982); *United States v. County of Fresno*, 429 U.S. 452, 462-463 n. 10 (1977); *United States v. Township of Muskegon*, 355 U.S. 484, 486-487, (1958); *United States v. City of Detroit*, 355 U.S. 466, 470 (1958), *United States v. Boyd*, 378 U.S. 39, 44-48 (1964). *See also South Carolina v. Baker*, 108 S. Ct. 1355, 1366 (1988); *Washington v. United States*, 460 U.S. 536, 540 (1983).

Since Chief Justice Marshall announced the doctrine of federal immunity in *M'Culloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819), this Court has laid down principles on a case by case basis that "strike a proper judicial accommodation between the interests of the States' power to tax and the concerns of the nation ." *United States v. Boyd*, 378 U.S. at 51. The thrust of these decisions has been to broaden the states' taxing powers by narrowing the constitutional limits of the immunity of federal contractors.

In light of this Court's decisions culminating in *United States v. New Mexico*, 455 U.S. at 734-735, there can be little doubt that cost-plus contractors using federal property in the performance of their contracts have a "beneficial use" and a "separate taxable interest" in government property.[2] *New Mexico* definitively shifted the question of federal immunity from ***whether*** federal contractors are immune from state taxation to the question of ***how*** a contractor's "separate taxable interest" in government-owned property may be taxed. The Tennessee statute addresses this by measuring the beneficial use in accordance with the value of the underlying property, after a deduction for restrictions on that use which render the property less valuable to the user.

The Sixth Circuit in rejecting that approach has placed such a peculiar impediment on a state's ability to value "beneficial use" that it, in effect, makes it difficult if not impossible, for a state actually to impose the tax which this Court's decisions have previously authorized. The decision of the Sixth Circuit to invalidate a state use tax by labeling a tax statute — clearly intended by the Tennessee legislature to tax a private contractor's beneficial use of government property — as an ad valorem tax on an interest in property, represents a fundamental departure from, and conflicts with, the governmental tax immunity precedents of this Court.

For instance, in *City of Detroit*, this Court stated that the value of federal property could be used to measure a private contractor's beneficial use of such property. This Court completely rejected the United States' argument that the tax

---

[2]*James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Curry v. United States*, 314 U.S. 14 (1941); *United States v. City of Detroit*, 355 U.S. 466 (1958); *United States v. Boyd*, 378 U.S. 39 (1964); *United States v. County of Fresno*, 429 U.S. 452 (1977); *United States v. New Mexico*, 455 U.S. 720 (1982).

was not constitutionally permissible since it was measured by the value of the property used, reasoning as follows:

> A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. . . . In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold. Public Act 189 [the Michigan statute imposing the use tax] was apparently designed to equalize the annual tax burden carried by private businesses using exempt property with that of similar businesses using nonexempt property. Other things being the same, it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval. In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used.

United States v. City of Detroit, 355 U.S. at 470. (Citations omitted). *See also United States v. Township of Muskegon*, 355 U.S. at 485-487.

This principle was reaffirmed by this Court in *County of Fresno*. In that case, the State of California had authorized counties in California to impose an annual use or property tax on possessory interests in improvements on tax-exempt land. The counties of Fresno and Tuolumne imposed this tax on federal employees living in housing owned and supplied to them by the United States Forest Service as part of their compensation. The value of the possessory interest was calculated by estimating the annual fair rental value of the houses and then adjusting that figure downward to reflect certain restrictions on the employees' possession of these homes. *United*

States v. County of Fresno, 429 U.S. at 453-456. This Court sustained the tax as well as the manner in which it was assessed, stating as follows:

> Insofar as it [*United States v. Allegheny County*, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944)] stands for the proposition that Government property used by a private citizen may not be taxed at its full value where contractual restrictions on its use for the Government's benefit render the property less valuable to the user, the case has no application here. Appellee counties have sought to tax only the individual appellant's interests in the Forest Service houses and have reduced their assessments to take account of the limitations of the use of the houses imposed by the Government.

United States v. County of Fresno, 429 U.S. at 462-463, n. 10.

Applying these principles, the Tennessee legislature enacted Tenn. Code Ann. § 67-5-203(c) to tax a private entity's beneficial use of government property. The statute declares that "all property of the United States . . . used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value . . . subject only to a deduction for any restricted use." The history of the statute shows that the legislature was attempting to equalize the tax burdens of users of federal tax exempt property with those of owners and other users of property in the state which is exempt from taxation only if it is used for an exclusively public purpose.

In labeling Tenn. Code Ann. § 67-5-203(c) an ad valorem tax on federal property, the Sixth Circuit offered little explanation for its reasoning. If the lower court believed it inappropriate to measure the value of the beneficial use according to the value of the underlying property, subject to a deduc-

tion for restricted use, then, as previously explained, the decision is in clear conflict with prior decisions of this court. Further, the Sixth Circuit erroneously equates Tenn. Code Ann. § 67-5-203(c) with the tax struck down in *United States v. State of Colorado*, 460 F.Supp. 1184 (D. Colo. 1978), *aff'd*, 627 F.2d 217 (10th Cir. 1980), summarily *aff'd sub nom. Jefferson County v. United States*, 450 U.S. 901 (1981). There, the Tenth Circuit Court of Appeals affirmed the district court's opinion holding unconstitutional Colorado's imposition of a tax upon Rockwell International Corporation's use of tax-exempt federal facilities located at the United States' Rocky Flats Plant in Jefferson County, Colorado. A close reading of both the Tenth Circuit's and district court's opinions reveals that the tax was held unconstitutional because it was measured by the value of the Rocky Flats Plant, with no statutory mechanism to segregate Rockwell's interest in the Plant and limit the tax to that interest. *United States v. State of Colorado*, 460 F.Supp. at 1189, *aff'd*, 627 F.2d at 221. However, the Tennessee statute avoids the *Colorado* problem. It segregates and taxes only the portion of the total value of the government property which may be attributed to the contractor's beneficial use. Consequently, even under *Colorado* the Tennesee tax is valid.

In its practical operation and effect the Tennessee tax is identical to those statutes upheld by this Court in *City of Detroit, Township of Muskegon* and *County of Fresno*. The petitioners see no justification for labeling Tenn. Code Ann. § 67-5-203(c) an ad valorem tax on an interest in real property when the state has so carefully adhered to the principles laid down by this Court to tax only beneficial use. In passing on the constitutionality of a state tax, this Court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Com.*, 286 U.S. 276, 280 (1932). "This is at least as true to uphold a state tax as to strike one down." *Detroit*

v. Murray Corp., 355 U.S. 489, 492 (1958). As the Sixth Circuit correctly found, a private contractor's beneficial use of federal tax-exempt property is a separate and distinct activity which may be subjected to taxation. The petitioners submit Tenn. Code Ann. § 67-5-203(c) constitutes a proper method whereby such a use may be taxed.

II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE SINCE IT SEVERELY CURTAILS STATES' ABILITY TO TAX PRIVATE CONTRACTOR'S BENEFICIAL USE OF FEDERAL PROPERTY, WHICH THIS COURT HAS RECOGNIZED AS A SEPARATE AND DISTINCT ACTIVITY SUBJECT TO STATE TAXATION, AND THEREBY RESTRICTS THE TAXING POWERS OF THE STATES UNDER THE SUPREMACY CLAUSE.

The Sixth Circuit's decision adversely affects not only Tennessee, but also numerous other states with similar statutes. At least ten (10) states, in addition to Tennessee, have enacted statutes which levy a tax on the possession and use of tax exempt property (including property of the United States) in an attempt to equalize tax burdens within the state. These states are Alaska, Arizona, California, Colorado, Michigan, Minnesota, Montana, Nevada, Oregon and Utah. *See* pp. 16a-20a, *infra* for pertinent provisions of the statutes. Each state, like Tennessee, measures the tax by the value or proportionate value of the underlying property.[3]

This Court has sustained these statutes and their application in Michigan (*United States v. City of Detroit*, 355 U.S. 466; *United States v. Township of Muskegon*, 355 U.S. 484) and California (*United States v. County of Fresno*, 429 U.S. 452). Relying on these decisions, the Supreme Court of Nevada,

[3]Further, the decision impacts any state where federal property is being used by a private contractor in enacting legislation to tax that federal contractor's beneficial use.

Oregon and Utah have upheld the constitutionality of similar statutes. *See United States v. State Ex Rel. Beko,* 493 P.2d 1321 (Nev. 1972); *Sproul v. Gilbert,* 359 P.2d 543 (Or. 1961); *Thiokol Chemical Corp. v. Peterson,* 393 P.2d 391 (Utah 1964).

In fact, one state statute, Oregon Revised Statutes § 307.060, is virtually identical to Tennessee's in its essential features:

T.C.A. § 67-5-203(c)	O.R.S. § 307.060
All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to §67-5-601, subject only to a deduction for any restricted use.	Real and personal property of the United States or any department or agency thereof held by any person under a lease or other interest or estate less than a fee simple, other than under a contract of sale, shall be assessed and taxed as for the full true cash value thereof subject only to deduction for restricted use.

In holding that T.C.A. § 67-5-203(c) is not a use tax statute, but rather an ad valorem tax on an interest in real property, the Sixth Circuit raised questions that have significant practical importance concerning the states' taxing powers under the Supremacy Clause of the Constitution. While it is clear that a state may tax a private contractor's beneficial use of federal property, the Sixth Circuit's opinion so limits the states' power to value such a beneficial use as to bring into question the very power to tax. Indeed, the Sixth Ciruit gives no indication of how beneficial use may be valued, if not by the method adopted by Tennessee.

Where, as here, the application of a state use tax is challenged, the threshold inquiry must be directed to the provisions

of the taxing statute itself. Where the statute by its express terms measures beneficial use by the value of the property and mandates a deduction on the value when there are restrictions on the use, it passes the test of constitutionality.[4] The lower court's decision, if allowed to stand, will cause confusion among the states as to how to draft use tax statutes which are intended to reach "only the contractor's interest in the Government-owned property", *See, New Mexico,* 455 U.S. at 741, n.14. This is a matter of significant concern not only because of the impact it will have on Tennessee, but because the decision itself represents a threat to other states which have adopted essentially similar statutes. The Sixth Circuit's decision undermines states' powers to equalize tax burdens, an action contrary to recent decisions of this Court which have fortified the states' power to levy such use taxes.

The time is ripe for the Court to definitively resolve the method by which a state may tax and value a private contractor's beneficial use of federal property.

[4]It is inappropriate at this point in the proceedings to assume Tennessee will improperly apply the taxing statute.

CONCLUSION

Since the opinion of the Sixth Circuit conflicts with longstanding precedents of this Court and will substantially affect the taxing powers of the states, a writ of certiorari should issue to review the decisions below.

Respectfully submitted,

JAMES O. PHILLIPS III
Hawkins County Attorney
107 East Main St., Suite 205
Rogersville, Tennessee 37857-0289
(615) 272-7633

GEORGE JOHN KETO*
Alvord & Alvord
Suite 200
918 Sixteenth St., N.W.,
Washington, D.C. 20006-2973
(202) 393-2266
Counsel for
Petitioner, Hawkins
County, Tennessee, *et al.*

CHARLES W. BURSON
Attorney General and Reporter
State of Tennessee

CHARLES L. LEWIS*
Deputy Attorney General
WILLIAM E. YOUNG
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-1902
Counsel for Petitioner,
State of Tennessee

*Counsel of Record

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 87-5478; 87-5479

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAWKINS COUNTY, Tennessee,
Defendant-Appellant,
(87-5478),

STATE OF TENNESSEE,
Intervenor Defendant-Appellant,
(87-5479).

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed September 30, 1988

Before: NELSON and NORRIS, Circuit Judges; and SPIEGEL, District Judge.*

ALAN E. NORRIS, Circuit Judge. The State of Tennessee and Hawkins County, Tennessee, appeal the judgment of the district court enjoining them from imposing a tax on a private contractor, Holston Defense Corporation ("Holston"), as cal-

---

*The Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

led for by Tenn. Code Ann. § 67-5-203(c). The court concluded that the tax was, in reality, imposed on the federal property used by Holston, and was therefore barred by the Supremacy Clause of the United States Constitution.

Since 1949, Holston has contracted on a cost-plus basis with the United States to operate and maintain the Holston Army Ammunition Plant, a 6,000-acre, federally owned facility used to produce munitions, and located in Hawkins and Sullivan Counties, Tennessee. Under the current contract, Holston is an independent contractor and not an agent of the United States. Munitions are produced at the facility only for the United States, although Holston may perform work at the plant for third parties, if the United States consents. All land, structures, equipment, and vehicles at the facility belong to the government, but over ninety-five percent of the work force is comprised of Holston employees. Holston procures the materials for carrying out the contract, using its own procedures and pledging its own credit to do so, but title to the materials transfers directly from the vendor to the United States. Holston pays no rent and holds no lease. Only the United States may admit or exclude persons from the property. Holston is reimbursed for all allowable expenditures to carry out the contract, including taxes payable by Holston. In addition, Holston receives a negotiated yearly fee, which on occasion has included added incentives, for instance, for achieving lower costs than targeted. In 1985, cost reimbursement was almost $76,000,000, and the fee was over $4,000,000.

Prior to the enactment of the tax statute at issue in this case, Hawkins County attempted to levy an ad valorem real property tax on Holston under another section of the code, on the theory that Holston held a taxable leasehold interest in the property. The United States sought a declaratory judgment that Holston had no property interest in the facility which could be subject to a real property tax. A similar case was filed against Anderson County, Tennessee, in response

to its attempt to levy a real property tax against Union Carbide Corporation, another cost-plus management contractor for the United States.

In each case, the district court rejected imposition of the tax, holding that the rights of Holston and Union Carbide under their contracts were not real property interests. Both decisions were affirmed by this court in separate opinions, based upon on a decision of the Tennessee Supreme Court in *Union Carbide v. Alexander*, 679 S.W.2d 938, 940-42 (Tenn. 1984), which held that, while the interest of Union Carbide could be subject to a privilege or use tax, it was not a real property interest taxable pursuant to Tennessee's ad valorem real property tax statute. *United States v. Anderson County, Tenn.*, 761 F.2d 1169, 1173-74 (6th Cir.), *cert. denied*, 474 U.S. 919 (1985); *United States v. Hawkins County, Tenn.*, No. 85-5533, slip op. (6th Cir., Jan. 8, 1987).

Tennessee's legislature then enacted Tenn. Code Ann. § 67-5-203(c) (Supp. 1987), which provides that property of the United States will be assessed to the user of the property at its real property value, minus a deduction for any contractual restrictions on its use, unless the property is used for an exclusively public purpose, or the user is an agent or instrumentality of the United States.[1] Pursuant to the new tax statute, Hawkins County assessed the tax against Holston.

The amount of the tax was calculated by the property asses-

---

[1]67-5-203(c): All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 67-5-601, subject only to a deduction for any restricted use. This subsection (c) shall not affect sales and use taxes imposed on users of federal property by § 67-6-209. The provisions of this subsection shall only apply to any county having a population in excess of forty-three thousand (43,000) according to the 1980 federal census or any subsequent federal census.

sor for Hawkins County, on what he called Holston's "use" of the ammunition plant property, based upon information provided by the United States on replacement costs of the real and personal property of the facility. Starting with "replacement cost," he then subtracted depreciation to arrive at "current value," and then reduced that value by an additional forty percent attributed to the contractual restrictions on Holston's use, to obtain the value of "Holston's segregated taxable interest" in the property. The statutory rate of assessment for industrial and commercial real property was then applied to arrive at "assessed value."

The United States filed suit in district court seeking a declaratory judgment that Tenn. Code Ann. § 67-5-203(c) was unconstitutional under the United States and Tennessee Constitutions, and an injunction against the imposition of tax. The lower court granted the government's motion for summary judgment, holding that Holston was so closely interrelated with the United States that the purported use tax was, in reality, a tax on the underlying government property itself.

We affirm the judgment of the district court, albeit on other grounds, for the reasons stated below.

A state may not levy a tax directly upon the United States [*Mayo v.. United States,* 319 U.5. 441, 447 (1943); *reh'g denied,* 320 U.S. 810 (1943); *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316 (1819)], or its closely connected agent or instrumentality. *United States v. New Mexico,* 45S U.S. 720, 735 (1982). The use of property of the United States may be taxed to a private contractor, even if the economic burden of the tax is ultimately borne by the United States, but only to the extent that the contractor has the beneficial use of the property. That is, a contractor may not be taxed beyond the value of his use. The use of property in connection with commercial activities carried on for profit is a separate and distinct taxable activity. *See id.* at 734-35, 741 n.14; *United States v. Boyd,* 378 U.S. 39, 44 (1964).

A cost-plus contractor for profit, Holston is not "so incorporated into the government structure as to become [an] instrumentalit[y] of the United States and thus enjoy governmental immunity." *Boyd,* 378 U.S. at 48. Holston produces munitions solely for the United States, and receives a negotiated, fixed fee in addition to its reimbursement for costs. This fee, of course, represents its profit. It is inescapable, then, that Holston has a beneficial use of the government-owned property.

However, Tenn. Code Ann. § 67-5-203(c) fairly cannot be said to impose a tax on Holston's beneficial use; instead, the statute describes an ad valorem tax on an interest in real property. The tax contemplated is similar to the one the State of Colorado attempted to impose on a corporation which, pursuant to a management contract, operated a federally owned nuclear weapons plant. Under the Colorado statute, if real property which was exempt from taxation was used by a corporation in connection with a business operated for profit, then the user of the property was subject to taxation as if it were the owner of the property. The Supreme Court affirmed the holding of the Tenth Circuit Court of Appeals, that "the 'substance' of the present procedure is not to tax [the corporation's] 'use' of government owned property, but to lay an ad valorem general property tax on property owned by the United States." *United States v. Colorado,* 627 F.2d 217 (10th Cir. 1980), *aff'd sub nom. Jefferson County, Colo. v. United States,* 450 U.S. 901 (1981).

The Tennessee statute provides that "all property of the United States" used for other than an exclusively public purpose is to be assessed to its user at a value determined pursuant to other sections of the code which spell out the procedure for calculating the value of real property for purposes of the state's ad valorem tax, "subject only to a deduction for any restricted use." The property assessor for Hawkins County said he started by determining the value of the facility pursuant to a commonly accepted method of appraising real prop-

erty, then reduced the value of the ammunition plant property to reflect the contractual restrictions on Holston's use. He then assessed the property to Holston at forty percent of its value, pursuant to Tenn. Code Ann. § 67-5-801 (1983), which determines the classification and rate of assessment for real property. The value he assigned to Holston in this instance was the same one he had previously assigned to the company when the county had unsuccessfully contended that Holston held a leasehold interest and attempted to impose the ad valorem real property tax.

Whether or not the Tennessee legislature had in mind a tax on beneficial use, it unquestionably did not describe one when it enacted the statute in question. Since Holston has been determined not to have a real property interest in the facility, Tennessee's attempt to tax Holston resulted in what was, in reality, a tax upon the United States itself.

The judgment of the district court is **affirmed**.

UNITED STATES of America

v.

HAWKINS COUNTY, TENNESSEE, Dan Brooks, Hawkins County Executive, Jerry Stewart, Hawkins County Trustee, Grady Marshall, Hawkins County PropertyAssessor and 21 members of the Hawkins County Commission,

State of Tennessee
(Intervening Defendnat).

No. CIV-2-86-201.

United States District Court,
E.D. Tennessee,
Northeastern Division.

April 10, 1987.

. . . . .

J. Edgar Schmutzer, Asst. U.S. Atty., Greeneville, Tenn., John J. McCarthy, Richard Correa, Washington, D.C., for plaintiff.

George John Keto, Washington, D.C., and James O. Phillips, III, Phillips & Hale, Rogersville, Tenn., for all defendants except intervening defendant.

W.J. Michael Cody, Atty. Gen., State of Tenn., Nashville, Tenn., for intervening defendant.

MEMORANDUM AND ORDER

HULL, Chief Judge.

This action for declaratory and injunctive relief came before the Court for a hearing on March 26, 1987, following the parties' filing of cross-motions for summary judgment. Plaintiff, the United States of America, seeks a declaratory ruling that Tennessee Code Annotated § 67-5-203(c) is unconstitutional and a permament injunction to preclude defendants from assessing a "use" tax, pursuant to § 67-5-203(c), upon Holston Defense Corporation, a private federal contractor. Defendants deny that § 67-5-203(c) is unconstitutional and deny that the use tax levied against Holston Defense Corporation violates the Supremacy Clause. Nevertheless, after careful consideration of the facts, legal precedent, and the record as a whole, the Court finds that T.C.A. § 67-5-203(c), as applied to Holston Valley Defense, does violate the Supremacy Clause of the United States Constitution for the reasons stated below.

The contested statute, Tennessee Code Annotated § 67-5-203, as amended by subsection (c), states as follows:

> 67-5-203 Government property.—(a)(i) All property of the United States, all property of the State of Tennessee, of any county, or of any incorporated town, city, or taxing district in the state that is used exclusively for public, county, or municipal purposes shall be exempt from taxation.
>
> . . . .
>
> (c) All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 66-5-601, subject only to a deduction for any restricted use. This subsection shall not affect sales and use taxes imposed on users of federal property by § 67-6-209.

Relying upon § 67-5-203(c), the property assessor for Hawkins County, Tennessee assessed a "use" tax of $8,125,239.32 against Holston Defense Corporation (Holston) for 1986. The tax was levied on the value of Holston's use of federal property at the Holston Army Ammunition Plant, which is owned by the United States and consists of 6,024 acres of land located in Hawkins and Sullivan Counties, Tennessee. The United States, which has maintained facilities for the production of explosives at the site since World War II, contracts with Holston to operate and manage its munitions plant pursuant to Government Contracdt No. DAAA09-83-C-4515. The government pays Holston an annual fixed fee and reimburses Holston for its costs of operation.

Nevertheless, the government maintains exclusive control of the plant. For example, the contract specifies that Holston must produce munitions exclusively for the United States, which assumes immediate title to the products without purchasing them; that Holston may not perform work on behalf of itself or any other private entity; and that Holston's right of access to the plant is limited to performing its contractual duties. Holston does not hold title, leasehold, or license to any government property.

Furthermore, while Holston has great expertise in producing munitions, Holston's efforts are subject to strict governmental control and supervision. For example, in accordance with its contract, Holston follows production schedules and stringent safety regulations promulgated by the United States Army. In addition, Holston must produce the explosives according to processes developed by the Army.

After analyzing this contract and the relationship between Holston and the government in 1985, this Court found that Holston owned no property interest in the plant and enjoined Hawkins County from assessing an *ad valorem* real property

tax against Holston. United States v. Hawkins County, Tennessee, ____ F.Supp. ____ (Civil Action No. 2-84-35, April 5, 1985), *aff'd*, 812 F.2d 1409 (6th Cir.1987). Subsequently, however, Tennessee enacted T.C.A. § 67-5-203(c).

Defendant Hawkins County and intervenor defendant, the State of Tennessee, argue that local authorities may tax a private corporation for its use of federal property in its commercial activities without offending the Supremacy Clause of the United States Constitution. Additionally, they argue that Hawkins County properly assessed a use tax against Holston pursuant to T.C.A. § 67-5-203(c) and that the use tax and its application to Holston should be upheld.

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819), Chief Justice Marshall first declared that the federal government and its property are immune from state taxation. "In so doing he introduced the Court to what has become a 'much litigated and often confusing field'; one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions.'" *United States v. New Mexico*, 455 U.S. 720, 730, 102 S.Ct. 1373, 1380, 71 L.Ed.2d 580 (1982), *quoting, United States v. City of Detroit*, 355 U.S. 466, 473, 78 S.Ct. 474, 478, 2 L.Ed.2d 424 (1958).

Determining when a state might constitutionally tax contractors that provide services to the federal government, as the Court must do in this cae, has been particularly troublesome. In *Jones v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), for example, the Supreme Court upheld a state tax on the gross receipts of a federal contractor, and in *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941), the Court held that the state might impose a tax on sales to federal contractors. In *United States v. Boyd*, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713 (1964), the Court upheld a use tax upon purchases made by

the contractor on behalf of the United States; and in *United States v. City of Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958), the Court stated that a use tax upon the lessee of a portion of a federal industrial plant was not repugnant to the Constitution. Similarly, the Court held, in *United States v. Township of Muskegon*, 355 U.S. 484, 78 S.Ct. 483, 2 L.Ed.2d 436 (1958), that a state may tax the use of federal property where a contractor made and sold goods to the United States for a profit.

More recently, the Court sanctioned New Mexico's imposition of a gross receipts tax and a compensating use tax on federal contractors who purchased tangible property for the federal government under an advanced funding procedure. *United States v. New Mexico, supra*. Similarly, the Court approved Washington's sales tax on materials sold to federal contractors in *Washington v. United States*, 460 U.S. 536, 103 S.Ct. 1344, 75 L.Ed.2d 264 (1983).

Nevertheless, the Court struck down state taxes in *United States v. Allegheny County*, 322 U.S. 174 (1944) (where the state sought to tax the value of federal machinery held by a private property); in *Livingston v. United States*, 364 U.S. 281 (1960) (where the Court summarily affirmed the invalidation of a state use tax imposed against a federal contractor); and in *Jefferson County v. United States*, 450 U.S. 901 (1981) (where the Court summarily affirmed the tenth circuit's holding (*United States v. State of Colorado*, 627 F.2d 217 (1980)) that a state may not impose a use tax on a private company acting under a management contract with the United States).

While these cases appear to conflict in many particulars, in each case a single consideration was paramount: the closeness of the interrelationship between the contractor and the United States Government. For example, *New Mexico, supra*, offers the following standard for measuring the appropriateness of taxing federal contractors:

> [T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.

455 U.S., at 736, 102 S.Ct., at 1383.

Two cases, *United States v. Township of Muskegon, supra.*, principally relied upon by the defendants, and *United States v. Colorado, supra.*, cited by the plaintiff, demonstrate the courts' application of this standard and serve as a point of distinction in resolving this case. In fact, the pertinent facts in *Colorado* are virtually identical to those in this case, while those in *Colorado* and the other cases relied upon by the defendants, although similar, are distinguishable in one critical area — the closeness of the interrelationship between the government and the contractor.

In *Colorado,* for example, as in this case, the state attempted to assess a use tax against a federal contractor producing weapons for national defense. The state authorized county governments to levy a tax against corporations which "leased, loaned, or . . . used" federal property "in connection with a business conducted for profit." Colo.Rev.Stat. § 39-3-112 (Supp. 1979). Rockwell, the federal contractor in *Colorado,* like Holston in the instant case, had a management contract with the United States to perform services on government property, which the United States owned in fee simple. Rockwell, like Holston, did not have a lease, permit, or license to the property; and its "use" of the property was strictly delineated by the management contract. As with Holston, the government paid Rockwell a fixed fee and reimbursed it for its costs. Like Holston, also, Rockwell provided services only and did not sell products to the United States or to any other party for a profit.

"[T]he key to the present problem," the *Colorado* court stated, "is the relationship between Rockwell and the United States and the nature of the activity which the State of Colorado seeks to tax." 627 F.2d., at 219. After analyzing the relationship between Rockwell and the government in light of the aforementioned facts, the tenth circuit held, and the Supreme Court, affirmed, that Colorado's taxing of Rockwell for its "use" of government property was "in reality a tax on the property itself and, as such, barred under the doctrine of implied immunity first found in *McCulloch v. Maryland* . . . ." 627 F.2d, at 219.

In *Muskegon*, on the other hand, the government permitted Continental Motors Corporation to use government facilities to manufacture Continental's goods, then sell them to the government. Pursuant to state law, the township levied a tax against Continental because of its use of tax-exempt property in its private business. Although the United States protested that the tax was invalid, the Supreme Court upheld the tax, explaining:

> The vital thing . . . is that Continental was using the property in connection with its own commercial activities. . . . [T]he fact that Continental was carrying out a contract with the Government does not materially alter the case. Continental was still acting as a *private enterprise selling goods to the United States*. In a certain loose way it might be called an "instrumentality" of the United States, but no more so than any other private party supplying goods for his own gain to the Government.

355 U.S., at 486-87, 78 S.Ct., at 485 (emphasis supplied).

Admittedly, the circumstances of *Muskegon* closely resemble those in *Colorado* and this case. Nevertheless, *Muskegon* is distinguishable, as demonstrated by the Supreme Court's decision to summarily affirm *Colorado* thirteen years after *Muskegon*. In *Muskegon*, for example, the Court emphasizes Con-

tinental's independence from government control, its "acting as a private enterprise selling goods to the United States." By contrast, Holston (like Rockwell) is much more closely interrelated to the government, as evidenced by the degree of control the government exerts over it. For example, Holston does not sell goods to the United States or to any other party. The goods already belong to the government. Holston merely manages and oversees the government's own production of goods. In other words, while Holston is an independent entity, it is not using government property to produce goods for sale in its own commercial activities. Manufacturing munitions at the Holston Army Ammunition Plant is a governmental activity which Holston manages.

The *Muskegon* Court also emphasizes Continental's freedom in using government property:

> [H]ere Continental was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them.

355 U.S., at 486, 78 S.Ct., at 485. In fact, while a formal lease may not have existed, the Court notes that Continental essentially paid rent by reducing the price of the goods it sold to the government. *Id.*, at 485, 78 S.Ct., at 485.

Holston, on the other hand, must use the property according to strict government direction. It must follow government manufacturing methods and production timetables, as well as government safety and environmental regulations. It has no lease, formal or informal, and, of course, cannot use the property to maximize profits. Therefore, the Court finds that *Colorado*, not *Muskegon* controls this action.

Other cases relied upon by the defendants can be readily distinguished. For example, in *United States v. City of Detroit*,

supra., the federal contractor leased property from the United States and sold its goods to private companies, as well as to the government. Furthermore, while "use" taxes were levied in *United States v. Boyd, supra.; United States v. New Mexico, supra.;* and *Washington v. United States, supra.;* in each instance, the use taxes were merely enforcement mechanisms for gross receipt or sales taxes.

Accordingly, after analyzing the circumstances of this case in light of *Colorado, Muskegon,* and the other cases cited by the parties, it appears to the Court that Holston, like Rockwell, is so closely interrelated with the government that the "use" tax on Holston is, in reality, a tax on the underlying government property.

Therefore, the Court finds that defendants' levying of a tax on Holston's use of federal property at the Holston Army Ammunition Plant is an impermissible tax on the property itself, and, as such, is barred by the Supremacy Clause of the United States Constitution. Accordingly, it is hereby ORDERED that defendants are hereby permanently ENJOINED from imposing a use tax under T.C.A. § 67-5-203(c) against the Holston Defense Corporation for its use of government property at the Holston Army Ammunition Plant.

Constitution of Alaska

Section 5. Interests in Government Property. Private leaseholds, contracts, or interests in land or property owned or held by the United States, the State, or its political subdivisions shall be taxable to the extent of the interests.

Ariz. Rev. Stat. Ann. (1987 Supp.)

§ 42-681. Definitions

In this article, unless the context otherwise requires:

* * * * *

3. "Possessory interest" means possession of land or improvements, or both, regardless of how the interest is identified in any document by which it is created, except possession pursuant to and by virtue of ownership of a freehold interest in the land or ownership of the improvements.

§ 42-682. Taxation of possessory interests

Possessory interests in the property of federal, state, county or municipal governments, and subdivisions thereof, are subject to taxation as unsecured personal property under this chapter.

§ 42-683. Valuation of possessory interests; delinquency

A. The value of a possessory interest is the value determined acording to standard appraisal methods prescribed by the department.

B. Possessory interests are subject to the procedures prescribed by this chapter for collection and payment of delinquent taxes.

Cal. [Rev. and Taxation] Code (West 1987)

Section 107, provides:

"Possessory interests" means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

Title 18, Cal. Adm. Code ¶21(b), provides:

(b) "Taxable possessory interest" means a possessory interest in non-taxable publicly owned real property, as such property is defined in section 104 of the Revenue and Taxation Code. . . ."

Section 104, provides:

"Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

Colo. Rev. Stat. § 39-3-112 (1982 and 1987 Supp.)

(1) When any real property . . . exempt from taxation is leased, loaned, or otherwise made available to and used by a . . . corporation in connection with a business conducted for profit, the lessee or user thereof shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property. . . .

Mich. Comp. Laws Ann. (1986)

211.81. Taxation of lessees or users of tax-exempt property; exceptions

Sec. 1 (1) When any real property which for any reason is

exempt from ad valorem property taxation is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessees or users of this real property; shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of this real property.

(2) Subsection (1) shall not apply to:

(a) Federal property for which payments are made instead of ad valorem property taxes in amounts equivalent to taxes which might otherwise be lawfully assessed. . . .

Minn. Statute Ann. (West 1988 Supp.)

272.01 Property subject to taxation

Subd. 2. (a) When any real or personal property which for any reason is exempt from ad valorem taxes, and taxes in lieu thereof, is leased, loaned, or otherwise made available and used by a private individual, association, or corporation in connection with a business conducted for profit, there shall be imposed a tax, for the privilege of so using or possessing such real or personal property, in the same amount and to the same extent as though the lessee or user was the owner of such property.

Mont. Code Ann. (1987)

15-24-1101. Federal property held under contract by private person subject to taxation. Real and/or personal property of the United States or any department or agency thereof held under contract of sale, lease or other interest or estate therein by any person for his exclusive use, shall be subject to assessment for ad valorem property taxation as provided in this part; provided that this part shall not apply

to real property held, and in immediate use and occupation by this state or any county, municipal corporation, or political subdivision therein.

Nev. Rev. Stat. (1987 Supp.)

361.157. Exempt real estate subject to taxation if used in business conducted for profit; exemptions.

1. When any real estate which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a natural person, association, partnership or corporation in connection with a business conducted for profit, it is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the real estate.

3. Subsection 1 does not apply to:

* * * * *

(b) Federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed;

* * * * *

4. Taxes must be assessed to lessees or users of exempt real estate and collected in the same manner as taxes assessed to owners of other real estate, except that taxes due under this section do not become a lien against the property.

361.159. Exempt personal property subject to taxation if used in business conducted for profit.

1. Personal property exempt from taxation which is leased, loaned or otherwise made available to and used by a natural person, association or corporation in connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property. . .

2. Taxes must be assessed to lessees or users of exempt personal property and collected in the same manner as taxes assessed to owners of other personal property, ...

Or. Rev. Statutes (1986)

307.060 Taxation of property that is leased from the United States

Real and personal property of the United States or any department or agency thereof held by any person under a lease or other interest or estate less than a fee simple, other than under a contract of sale, shall be assessed and taxed as for the full true cash value thereof subject only to deduction for restricted use.

Utah Code Ann. (1987 Repl.)

59-4-101. Tax basis — Exceptions — Assessment and Collection.

(1) A tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit.

(2) The tax imposed under this chapter is the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property. The amount of any payments which are made in lieu of taxes is credited against the tax imposed on the beneficial use of property owned by the Federal Government.